APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed in Open Court Apr. 4, 1952
Criminal No. 579-52

UNITED STATES OF AMERICA

vs.

HENRY L. PECKHAM, JR.

Indictment

The Grand Jury charges:

On or about May 2, 1951, within the District of Columbia, Henry L. Peckham, Junior, with intent to procure the miscarriage of Mary M. Ott, otherwise known as Mary Lee Ott, *who was then pregnant,* used upon her an instrument and means of a kind unknown to the Grand Jury, and administered to her medicine, drug and substance of a kind unknown to the Grand Jury.

CHARLES M. IRELAN
Attorney of the United States in and for the District of Columbia

A TRUE BILL:
CHARLES A. LYONS
Foreman.

Excerpts from Opening Statement of the United States Attorney

3 We intend to show you then that in the meantime, I believe, during the month of April, that George Christenson contacted the defendant about the abortion on Mary Ott. And he had some discussion with the defendant

in reference to the pregnancy of Miss Ott and the defendant performing an abortion on her.

• • • • • • • • • • •

We intend to show you at that time that the defendant put Miss Ott on this table, removing her undergarments, and there while she was on the table he again dilated the vagina by the use of the speculum, and then he put some medicine of some kind or substance of some kind and also used certain instruments on her.

The witness will tell you of the pain and the feeling of these instruments at the time they were insterted into her by the defendant.

• • • • • • • • • • •

At about eleven or twelve o'clock that night the evidence will show that she started passing these large clots and having terrific pain at the time and then about one or two o'clock in the morning, the evidence will show that Miss Ott passed the fetus, and the cord was cut.

And then ladies and gentlemen of the jury, the evidence will further show that Miss Ott put in a telephone call to the defendant and notified him that she had passed the fetus.

And that morning, the morning of May the 3rd, the defendant came to the Harrington Hotel and went to the room of Miss Ott and there, the evidence will show that, he then inserted instruments into her private parts at that time removing certain tissue and then further told Miss
4 Ott at that time that in a few days or the first part of the week that she was to come back to his office.

• • • • • • • • • • •

Testimony of Mary M. Ott

14 By Mr. McLaughlin:

Q. What else did he do at that time? A. Well, well, I could feel pain. I knew that he was, he was probing around in there but that's all I could say.

Q. How long would you say you stayed on the table at that time? A. I would say about twenty-five minutes, half hour.

Q. Now, can you say whether or not he used more than one instrument, inserted more than one instrument in your vagina? A. Yes, sir.

Q. Can you tell us whether or not he put any substance of any kind in your vagina? A. Well, at first he put something in that he told me was some sort of a cream or something, and then the needle, [46] and then this clamp instrument which was inside me while he was doing this. And—

• • • • • • • • • • •

Q. And as a result of those pains did anything happen? A. Yes. I, first I started to bleed and then I—George helped me into the bathroom and then I stayed in there quite some time until I passed the fetus.

Q. And did you actually see the fetus? A. Yes, sir.

Q. And can you tell us whether or not it was formed? A. It was partially formed. I remember seeing the feet and legs.

The Court: We will take our recess at this time.

(Thereupon there was a recess following which this then occurred:)

• • • • • • • • • • •

Mr. Ahern: There can't be a violation of the statute if the woman is not pregnant.

The Court: It doesn't make any difference who is—

Mr. McLaughlin: (interposing) Who is responsible, no.

The Court: You can attack her as to whether she is pregnant or not, naturally, but who made her pregnant wouldn't make any difference.

Mr. Ahern: Very well.

• • • • • • • • • • •

Testimony of Dr. Clark P. Halstead

278 Direct Examination

By Mr. Ahern:

Q. Doctor, would you give your full name? A. Clark P. Halstead, H-a-l-s-t-e-a-d.

Q. And, Doctor, are you a physician here in the District of Columbia? A. I am.

Q. And where is your office, Doctor? [927] A. 1418 M Street, Northwest.

Q. Now, Doctor, in response to a subpoena and in response to my directions, have you checked your records of patients that visited you in January of 1951? A. I have.

Q. Have you also checked as to February, 1951? A. Yes, I have.

Q. Now, Doctor, did, in searching those records, did in January or February of 1951 a Mary Christenson come to see you regarding pregnancy? A. I have no record of it in my files.

Q. Did a Mary Ott come to you? A. I have no such record in my files.

* * * * * * * * * *

Testimony of Dr. Christopher J. Murphy

315 Q. Yes. Now, let me ask you this, Doctor:

Let's assume a woman, just for the sake of argument, missed a period in November of 1950 or De-

316 cember. Let's make it December of 1950.

January, February, March, April, May. So that in May [974] she would be five months pregnant.

Now, Doctor, in your opinion as an expert, if that woman went to a doctor and allegedly had an injection from a hypodermic needle and certain dilations with an instrument and felt a certain burning sensation and then some five hours later, or, six hours later, began to have labor pains and then passed a fetus which was formed from the feet, but the top from the waist up was completely destroyed,

a mass, would you say that was medically possible? A. That would be impossible.

Mr. Ahern: That is all, Doctor.

* * * * * * * * * *

Colloquy Between Court and Counsel

361 So Judge, I typed up two instructions. I retyped 23 and I got 26 here.

And it is my view, your Honor, to violate the statute and I will admit I haven't pursued it any further, but it is my view to violate the statute the woman must be pregnant; whether or not she is viable, I won't press at this point.

* * * * * * * * * *

Mr. Ahern: I might say that Holtzoff said that it must be pregnant, too.

The Court: Well, I just can't follow Holtzoff. If the doctor thought that the woman was pregnant—this is an intent statute pure and simple specific intent.

* * * * * * * * * *

362 The Court: That is right. That doesn't make any difference in my interpretation of the law. That will give you something else to hang your hat on in the Court of Appeals.

This 26 is the substitute of—

Mr. Ahern: (interposing) I redictated 23 and I defined the term "live".

The Court: 23 is what?

Mr. Ahern: 23 is the one that we have under discussion right now.

The Court: That is the elements. Now, what is this?

Mr. Ahern: 26 is the—

The Court: (interposing) Amended one?

Mr. Ahern: Yes, on this point.

The Court: Well, I can't give that second element.

Mr. Ahern: No, but I mean, that puts it right to issue, your Honor.

The Court: Well, I will have to deny 23 and 26 because I can't find any justification for that pregnancy. I will write "denied" and then we can file it.

You see, this is not an attempt, itself. You see, so the crime wouldn't have to be completed; that is, the abortion wouldn't have to be completed.

This statute is not an attempt statute. This stat-
363 ute says [Separate Tr. 5] that where I use either a drug or an instrument and at that time I had in my mind an intention to procure a miscarriage—

Mr. Ahern: (Interposing) Even though one couldn't be performed?

The Court: That is right. You see, the distinction between the two makes no difference if I did it at that time and intended to do it.

Of course, the other statutes in other states use upon a pregnant woman or a woman with quick child or a woman quick with child, but our statutes have reference to just any woman, any woman, see?

Mr. Ahern: Well, then, Your Honor, if that were true, if your reasoning is to be followed he had no—well, first of all, I would say that couldn't follow for this reason, your Honor.

Once this indictment uses the word "pregnant"—

The Court: (interposing) I have got the cases here in which the indictment uses the word, surplusage.

Mr. Ahern: The Government didn't use —

The Court: (interposing) Well, I claim she was pregnant; then the jury can decide that she was or there can be a doubt in their minds as to whether she was pregnant, but I say according to all the law that I can find in our particular statute, it is immaterial whether the woman is pregnant or whether the indictment says surplusage.

[Separate Tr. 6] So that is why I wanted to bring you in and put this on the record so you will be protected too.

Mr. Ahern: Yes.

The Court: The Court has ruled that the question of pregnancy is immaterial; that if the jury believed beyond a reasonable doubt that the doctor was convinced that the complaining witness was pregnant, then the crime was completed if he administered a drug or used an instru-
364 ment with the intent to procure a miscarriage.

Now, in Crichton vs. the United States 67 Appeals, D. C., 301, the Court said this:

"The statute prohibits the use by any person of any substance or instrument for the purpose of procuring the miscarriage of any pregnant woman, unless when such use is necessary to preserve the life or health of the woman."

I hold that the phrase "pregnant woman" in the sentence just quoted is dictum because I am ruling that the question of pregnancy in the abortion statute is immaterial.

Now, that protects you.

* * * * * * * * * *

Instructions of Court to Jury

373 So that you are instructed that where the statute provides for the punishment of an attempt to procure a miscarriage of any woman without stating that she must be pregnant or a pregnant woman, it is immaterial whether the woman was actualiy pregnant or not.

* * * * * * * * * *

Prayer No. 26

392 [R. 1091]

Denied.

The jury is instructed that the elements of this offense which must be proved beyond a reasonable doubt are

(1) That the defendant prescribed or administered to the woman named in the indictment a medicine, drug or other substance, or he used on her some instrument or means.

(2) That the woman was pregnant at the time this was done.

(3) That the defendant did the act with intent to procure a miscarriage.

If these elements have not been proven beyond a reasonable doubt you must give the benefit of that doubt to the defendant and find him not guilty.

---

406 UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12261

HENRY L. PECKHAM, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided July 14, 1955

Mr. Albert J. Ahern, Jr., for appellant.

Mr. Lewis Carroll, Assistant United States Attorney, with whom *Messrs. Leo A. Rover*, United States Attorney, and *Arthur J. McLaughlin*, Assistant United States Attorney, were on the brief, for appellee.

Before EDGERTON, WASHINGTON, and DANAHER, Circuit Judges.

PER CURIAM: Appellant was convicted on an indictment charging that on or about May 2, 1951, he used instruments upon and administered drugs to a named woman, then pregnant, with intent to procure her miscarriage. His chief, though not his only, contention on this appeal is that the District Court erred in instructing the jury that it was immaterial whether or not the woman was pregnant, if at the time the defendant believed she was pregnant.

If the statute makes pregnancy immaterial, the indictment cannot make it material. The government's brief contains a table showing that the so-called abortion statutes of many states explicitly make pregnancy necessary (*e.g.*, "any pregnant woman"); those of many other states explicitly make it unnecessary (*e.g.*, "a woman whether pregnant or not"); and those of a few states say "any woman", or "a woman", without mentioning pregnancy. Formerly the District of Columbia statute used the expression "any pregnant woman" or "any woman in any condition of pregnancy".[1] But the Code of 1901 omitted all reference to pregnancy and adopted the phrase "any woman", which has since been retained.[2] A similar change in the English statutes has long been recognized as making pregnancy unnecessary.[3] We think the change in our statute has the same effect.[4]

407

We find no error affecting substantial rights.

Affirmed.

---

[1] COMPILED STATUTES, Albert and Lovejoy, 1894, Chapt. XVI, § 13.

[2] At the time of the alleged offense the statute read: "Whoever, with intent to procure the miscarriage of any woman, prescribes or administers to her any medicine, drug, or substance whatever, or with like intent uses any instrument or means, unless when necessary to preserve her life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned for not more than five years; or if the woman or her child dies in consequence of such act, by imprisonment for not less than three nor more than twenty years." D.C. Code (1901) § 809, 31 Stat. 1322; D.C. Code (1951) § 22-201.

[3] *Reg.* v. *Goodall*, 2 Cox Crim. Cases 41 (1846); *Reg.* v. *Titley*, 14 Cox Crim. Cases 502 (1880).

[4] In *Crichton* v. *United States*, 67 App. D.C. 300, 301-302, 92 F. 2d 224, 225-226, *cert. denied*, 302 U.S. 702, this court assumed that pregnancy was necessary, but this assumption did not affect the decision. *Cf. Peckham* v. *United States*, 93 U.S. App. D.C. 136, 143, 210 F. 2d 693, 700.

408 Filed July 14, 1955

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,261

HENRY L. PECKHAM, JR., *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the District of Columbia.

Before: EDGERTON, WASHINGTON, and DANAHER, Circuit Judges.

Judgment

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

PER CURIAM

Dated: July 14, 1955.

---

419 Filed Aug. 31, 1955

Order

Upon consideration of appellant's petition for a rehearing or amendment to this Court's opinion, it is

ORDERED by the Court that the aforesaid appellant's petition be, and it is hereby, denied.

PER CURIAM

Dated: August 31, 1955

420 Filed Sep. 9, 1955

Order

Upon consideration of appellant's petition for a rehearing in banc in the above-entitled case, it is

ORDERED by the Court that the aforesaid petition be, and it is hereby, denied.

PER CURIAM

Dated: September 9, 1955

Circuit Judge Prettyman did not participate in the foregoing order.

SUPREME COURT OF THE UNITED STATES

No. , October Term, 1955

HENRY L. PECKHAM, JR., M. D.

vs.

UNITED STATES OF AMERICA

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 10th, 1955.

/s/ HUGO L. BLACK
Associate Justice of the Supreme Court of the United States.

Dated this 30th
day of September, 1955